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BEFORE THE ARIZONA CORPORATION COMMISSION
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AZ CORP COMMISSION
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COMMISSIONERS

GARY PIERCE, Chairman
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

IN THE MATTER OF THE FORMAL
COMPLAINT OF SWING FIRST GOLF,
LLC, AGAINST JOHNSON UTILITIES,
LLC.

DOCKET NO. WS-02987A-08-0049

NOTICE OF FILING
PLEADINGS, RULINGS, MINUTE
ENTRIES AND ORDERS FILED IN
SUPERIOR COURT CASE SINCE
JANUARY 27, 2012

In her Amended Procedural Order dated February 17, 2012, the administrative law judge ordered the parties to docket all pleadings, rulings, minute entries, and orders, filed in *Johnson Utilities, LLC, et al. v. Swing First Golf, LLC, et al.* (Cause No. CV2008-000141). In compliance with this order, Johnson Utilities LLC hereby files copies of the following documents:

DOCUMENT	DATE FILED
Motion to Voluntarily Dismiss Count 3 (Defamation)	March 8, 2012
Petition for Special Action (Court of Appeals)	March 9, 2012

RESPECTFULLY submitted this 12th day of March, 2012.

Arizona Corporation Commission

DOCKETED

MAR 12 2012

DOCKETED BY

BROWNSTEIN HYATT FARBER SCHRECK
LLP

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Attorneys for Johnson Utilities, LLC

1 ORIGINAL and thirteen (13) copies of the
2 foregoing filed this 12th day of March, 2012, with:

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8 this 12th day of March, 2012, to:

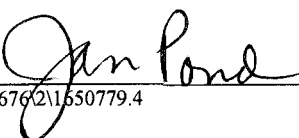
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6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF MARICOPA**

8 JOHNSON UTILITIES, LLC; THE CLUB
9 AT OASIS, LLC; GEORGE H. JOHNSON;
JANA S. JOHNSON; BRIAN F.
10 TOMPSETT,

11 Plaintiffs,

12 v.

13 SWING FIRST GOLF, LLC; DAVID
ASHTON,

14 Defendants.

15
16 SWING FIRST GOLF, LLC, an Arizona
limited liability company; DAVID ASHTON
and JANE DOE ASHTON, husband and
17 wife,

18 Counterclaimants,

19 v.

20 JOHNSON UTILITIES, LLC, d/b/a
JOHNSON UTILITIES COMPANY, an
21 Arizona limited liability company; THE
CLUB AT OASIS, LLC, an Arizona limited
22 liability company; GEORGE H. JOHNSON
and JANA S. JOHNSON, husband and wife;
23 BRIAN F. TOMPSETT and JANE DOE
TOMPSETT, husband and wife,
24

25 Counterdefendants.
26

Cause No. CV2008-000141

**MOTION TO VOLUNTARILY
DISMISS COUNT 3 (DEFAMATION)**

(Assigned to the Honorable Dean Fink,
Assigned to Judge John Rea for trial)

1 Johnson Utilities LLC moves to voluntarily dismiss Count 3 (Defamation) of Johnson
2 Utilities, LLC's Second Amended Complaint with prejudice.

3 RESPECTFULLY SUBMITTED this 8th day of March, 2012.

4 MARGRAVE CELMINS, P.C.

5 By /s/ Michael L. Kitchen

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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

Johnson Utilities, LLC; The Club at
Oasis, LLC; George H. Johnson; Jana
S. Johnson; Brian F. Tompsett,

Petitioners,

vs.

Superior Court of Arizona, in and for
the County of Maricopa, and the
Honorable Dean Fink, a judge thereof,

Respondents,

and

Swing First Golf, LLC; David Ashton,

Respondents-Real Parties in
Interest.

1 CA-CV _____

Maricopa County Superior Court
No. CV2008-000141

PETITION FOR SPECIAL ACTION

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INTRODUCTION

Petitioners Johnson Utilities, LLC, The Club at Oasis, LLS, George Johnson, Jana Johnson and Brian Tompsett ("Petitioners") request that the Court accept jurisdiction and grant relief to remedy the trial court's erroneous ruling of March 7, 2012, which denied Petitioner's Motion to Dismiss Swing First Golf's counterclaim (count five) based on ACC-approved tariffs for lack of subject matter jurisdiction. *See* trial court's March 7, 2012 order, attached. This Court has jurisdiction pursuant to A.R.S. § 12-120.21(a)(4) and Rule 4, Rules of Procedure for Special Actions.

Swing First Golf, L.L.C. ("Respondent") has brought a claim against Petitioners alleging, among other things, that Respondent Johnson Utilities, LLC, a utility which holds a certificate of convenience and necessity issued by the Arizona Corporation Commission ("ACC") to provide water and sewer service in southeastern Maricopa County and adjoining areas of Pinal County, has failed to comply with ACC-approved tariffs for water and sewer service provided to Respondent, that Petitioner "breached" the "terms of [ACC]'s tariffs" by delivering Central Arizona Project ("CAP") water as opposed to effluent water to Respondent, that Petitioners overcharged Respondents for water, that Respondents were overcharged for meters or charged for meters they did not need and that Petitioners' billings were erroneous. *See* First Amended Counterclaim, Appendix

#1. However, on January 25, 2008, Respondent filed a formal complaint with the Arizona Corporation Commission alleging that it had been overcharged by Petitioner, that Petitioner delivered CAP water rather than effluent water, that Petitioners overcharged Respondents for water, that Respondents were overcharged for meters or charged for meters they did not need and that Petitioners' billings were erroneous. *See* Formal Complaint before the ACC, Appendix #2. Because the ACC has exclusive jurisdiction and authority to address claims by consumers relating to these issues, the Superior Court lacks jurisdiction to hear them. Petitioners therefore sought dismissal of Respondent's tariff-based claims in Superior Court, which was summarily denied. The trial court erred in failing to grant Petitioners' Motion to Dismiss, however. The trial court's ruling is contrary to the well-established body of law regarding the exclusive jurisdiction of the ACC over issues such as those presented in Respondents' formal ACC Complaint and counterclaim five, and as such the trial court's order refusing to dismiss these claims is arbitrary, capricious and an abuse of discretion, and exceeds the authority and jurisdiction of the trial court. *See* Rule 3, Rules of Procedure for Special Actions. This Court should accept review and reverse the trial court's ruling.

JURISDICTIONAL STATEMENT

The Court should accept jurisdiction in this matter because Petitioners do not have an equally plain, speedy and adequate remedy by appeal. *See* Rule 1(a), Rules of Procedure for Special Actions. An appeal is an inadequate remedy, and an

unavailable remedy, when the trial court denies a motion to dismiss or other motion for summary disposition and the matter turns on an issue of pure law, such as subject matter jurisdiction. Appellate intervention by special action is therefore appropriate. *See Cardon v. Cotton Lane Holdings*, 173 Ariz. 203, 210, 841 P.2d 198, 205 (1992) (factor in accepting special action jurisdiction was fact that issue was question of law); *Northern Propane Gas Co. v. Kapps*, 127 Ariz. 522, 525, 622 P.2d 469, 472 (1980) (“proper procedure for appellate review of a motion to dismiss is through a petition for special action”); *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, 218 P.3d 1045, 1050 (App. 2009) (Court of Appeals will “accept jurisdiction of a special action when the trial court is ‘threatening to proceed without subject matter jurisdiction in excess of its authority’”), citing *Kadera v. Superior Court*, 187 Ariz. 557, 559, 931 P.2d 1067, 1069 (App. 1996). *See also* Arizona Rule of Procedure for Special Actions 3(b).

Appellate Courts will exercise special action jurisdiction to remedy the incorrect interpretation and application of law. *See Taylor v. Jarrett*, 191 Ariz. 550, 551-52, 659 P.2d 807, 808-809 (App. 1998) (special action jurisdiction accepted to reverse denial of motion to dismiss concerning personal jurisdiction). Because the issue of jurisdiction raised here is a pure question of law, and because the trial court’s error in denying the motion to dismiss results in the trial court threatening to proceed without, or in excess of, its jurisdiction or legal authority, special action relief is proper. *See Grosvenor Holdings, supra*; *see also Qwest*

Corp. v. Kelly, 204 Ariz. 25, 27, 59 P.3d 789, 791 (App. 2002) (significant threshold questions regarding scope of the Arizona Corporation Commission's exclusive jurisdiction over certain claims are purely legal and of state-wide importance, and appropriate for special action jurisdiction). *See also U.S. West Communications Inc. v. Arizona Corporation Commission*, 201 Ariz. 242, 34 P.3d 351 (2001) (questions relating to obligations of ACC mandated by Constitution to be legal questions of State-wide importance, warranting acceptance of special action jurisdiction).

The issue raised here is one of pure law and of State-wide importance. Whether the Arizona Corporation Commission has exclusive jurisdiction over tariff-based claims is a question of law, to be ruled upon by the Court. And, to the extent that it would be inappropriate for the trial court to exercise jurisdiction where jurisdiction does not lie, special action relief is appropriate to prevent the trial court from proceeding in excess of its jurisdictional authority, and to prevent prejudice arising from its exercise of such excess authority. For these reasons, the Court can best serve the public interest and principles of judicial economy by resolving the fundamental legal questions raised by this petition. The Court should exercise its jurisdiction to hear and decide this special action pursuant to A.R.S. § 12-120.21(A)(4), Rule 1, Rules of Procedure for Special Actions and Rule 7, Rules of Procedure for Special Actions.

**STATEMENT OF MATERIAL FACTS AND
PROCEDURAL BACKGROUND**

This matter arises out of a dispute between a utility company and a consumer. Petitioner Johnson Utilities, LLC initially filed a Complaint against Respondent Swing First Golf on January 9, 2008, which has twice been amended. *See Appendix #3.* That Complaint seeks payment for the provision of water and waste water services to Respondents. Respondents filed a formal Complaint before the Arizona Corporation Commission, on January 25, 2008, alleging, among other things, that Petitioners delivered Central Arizona Project water, rather than effluent water, to Respondents, that Petitioner overcharged Respondents for water, that Respondents were overcharged for meters or charged for meters they did not need, and that Petitioners' billings were erroneous. *See Appendix #2.*

In response to Petitioners' Superior Court action, Respondents filed a Motion to Dismiss, claiming that the dispute regarding Respondents' failure to pay Petitioner is "already the subject of a pre-existing complaint proceeding at the Commission, the body given exclusive Constitutional jurisdiction over Utility's rates and tariffs. Resolution of this matter will require this Court to interpret utility's rates, tariffs and conditions of service, subjects exclusively within the Commission's Constitutional jurisdiction." *See Appendix #4,* Respondents' Motion to Dismiss and Memorandum of Points and Authorities dated April 21, 2008. Respondent claimed that the trial court lacked subject matter jurisdiction over the dispute relating to the rates charged and payment to the utility by the

consumer. *Id.* The trial court ultimately determined that the issue facing the trial court was “the charge for, nature and quality’ of the regulated water service provided by Johnson.” See minute entry order dated May 27, 2008, Appendix #5. The trial court thus determined that “it should refrain from becoming involved until the Corporation Commission has made its initial determination.” *Id.*, citing *Campbell v. Mountain States Telephone and Telegraph Co.*, 120 Ariz. 426, 430-31 (App. 1978). Because other tort and contract-based allegations were still at issue, the litigation proceeded through discovery.

At the end of discovery, Petitioners filed a Motion for Summary Judgment, seeking resolution of all claims. It was believed that these issues would all be resolved via that motion. However, the trial court ultimately granted summary judgment as to certain allegations, but not all. Notably, the trial court dismissed all contract claims relating to rates Respondent believed it should have been charged for water, because the trial court determined that any contractual price term that may have differed from the ACC tariff rates is illegal and against public policy. See under advisement ruling dated February 9, 2012, Appendix #6. Although all contract claims were resolved by the trial court, the trial court did not resolve Respondent’s counterclaim number 5, relating to tariffs charged for water -- the very issue the trial court had previously stated should not be addressed by the trial court unless and until the Arizona Corporation Commission had addressed it. The Complaint in front of the Arizona Corporation Commission is still pending.

Once it became clear that all of the allegations in Respondents' counterclaims were not resolved by a motion for summary judgment, it also became clear that the trial court could not move forward to trial on the tariff-based claims (i.e. counterclaim five), given both the prior ruling of the trial court and controlling Arizona law which grants exclusive jurisdiction over tariff disputes to the Arizona Corporation Commission. Because trial was set for March 13, 2012 and the ACC had not yet addressed the pending complaint, Petitioners immediately filed a Motion to Dismiss Count Five of the Respondents' counterclaims based on the lack of trial court jurisdiction over such claims. *See Appendix #7.* The trial court ordered expedited briefing, but on March 7, 2012, the trial court denied the motion to dismiss. *See Appendix #8.* Trial is set to begin on this, and all other remaining claims, on March 12, 2012. *See Appendix #9.* However, to the extent that the trial court would be proceeding without, or in excess of, its jurisdiction or legal authority by addressing issues exclusively within the purview of the Arizona Corporation Commission, this Court is asked to grant relief in the form of dismissing the tariff-based claims due to lack of subject-matter jurisdiction.

ISSUE PRESENTED FOR REVIEW

Does the Arizona Corporation Commission have Exclusive Jurisdiction Over Claims Relating to ACC-Approved Tariffs for Water and Sewer Service and Complaints About Compliance with those Tariffs?

ARGUMENT

The trial court erred in failing to grant Petitioners' Motion to Dismiss because the Arizona Corporation Commission has exclusive jurisdiction over ACC tariff-based complaints. Because this issue is purely a question of law, *de novo* review by this Court is appropriate. See e.g., *Brink Elec. Constr. Co. v. Arizona Department of Revenue*, 184 Ariz. 354, 358, 909 P.2d 421, 425 (1995) (standard of review on questions of law is *de novo*).

The Arizona Corporation Commission, and not the Superior Court, has exclusive jurisdiction to address the tariff claims.

The Arizona Corporation Commission has exclusive and plenary jurisdiction, as well as the necessary expertise, to address all claims regarding the nature, application and interpretation of ACC-approved tariffs for water and sewer service between the parties herein. Article 15, § 3, of the Arizona Constitution imbues the ACC with the authority to prescribe just and reasonable rates and charges:

The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and to make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations . . .

The jurisdiction granted under Article 15, § 3 is exclusive and plenary. *See State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 138 P. 781 (1914). However, the commission's "power goes beyond strictly setting rates and extends to enactment of the rules and regulations that are reasonably necessary steps in rate making." *See State Ex Rel. Corbin v. Arizona Corp. Commission*, 174 Ariz. 216, 218, 848 P.2d 301, 303 (App. 1992). Further, the Commission has been imbued with the judicial jurisdiction to hear grievances and consumer complaints, including those that involve allegations such as deceptive business and marketing practices. *See A.R.S. §§ 40-110, 40-202(C); Arizona Corp. Commission v. State Ex Rel. Woods*, 171 Ariz. 286, 830 P.2d 807 (1992). "With respect to matters solely and directly involving questions of the reasonableness of services, rates and the classification of services, the commission's authority is exclusive and plenary." *Qwest Corp. v. Kelly*, 204 Ariz. 25, 30, 59 P.3d 789, 794 (App. 2002).

The issue here is not whether certain tort-based claims are appropriate for consideration by the ACC. Rather, the issue is whether claims regarding whether the appropriate tariff was charged, whether effluent or CAP water should have been delivered, whether billing credits or other billing issues were appropriately handled, and whether any ACC environmental policy has any impact on Respondents' claims – all issues pending currently before the Arizona Corporation Commission in Respondents' formal complaint, docket no. WS-02987A-08-0049 – are the types of claims over which the Superior Court can exercise jurisdiction.

Arizona law makes clear that the ACC retains statutory authority and exclusive jurisdiction to address these types of issues. For example, A.R.S. § 40-246(A) provides the ACC with authority to address consumer complaints “setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or any order or rule of the commission. . .” Thus, not only does the ACC possess exclusive authority to prescribe reasonable rates and charges, but it is the ACC’s authority to resolve consumer complaints relating to the reasonableness of services, rates and charges. *See Qwest Corp. v. Kelly*, 204 Ariz. at 30, 59 P.3d at 794. *See also* A.R.S. § 40-321(A), which empowers the commission to evaluate the service provided by any public service corporation as well as the methods of distribution or supply employed by the public service corporation, to determine what is just, reasonable, safe, proper, adequate or sufficient and to enforce its determination by order or regulation. “Through long experience and service, the corporation commission has developed specialized expertise in matters related to its regulation of the service and financial aspects of public service corporations. This specialized expertise enables the commission to approach issues involving the service aspect of public service corporations with an appreciation for the relevant public policies and the best methods for achieving those policies.” *Campbell v. Mountain States Telephone and Telegraph Co.*, 120 Ariz. 426, 431, 586 P.2d 987, 992 (App. 1978).

Respondents have expressly acknowledged that the nature of the claims in this matter relating to application of ACC tariffs and rates as applied here "is exclusively within the commission's constitutional jurisdiction." *See* Respondents' 2008 Motion to Dismiss, Appendix #4. The trial court, in fact, has already ruled that the issue presented relates to the "charge for, nature, and quality, of the regulated water service provided by Johnson," such that the trial court determined that it "should refrain from becoming involved until the Corporation Commission has made its initial determination." *See* minute entry order dated May 27, 2008, Appendix #5. The Arizona Corporation Commission currently has pending before it an active formal complaint by Respondents for the very same claims and allegations as are pending before the Superior Court in Respondents' counterclaim count five relating to tariffs, billings and related issues.

Allowing these issues to go forward to a jury in Superior Court not only would violate the exclusive authority of the Arizona Corporation Commission (which has the expertise and understanding to properly evaluate and address these issues), but it could result in significantly inconsistent determinations by a lay jury and ultimately by the corporation commission on the very same issues. Petitioner should not be subjected to the potential for inconsistent resolutions, or to lay-jury verdicts that may be completely inconsistent with or contrary to the public policy, expertise and approach taken by the Arizona Corporation Commission in regulating utilities. In fact, it is for these reasons that our Constitution and

legislature have vested the Arizona Corporation Commission with exclusive jurisdiction over these types of issues, to ensure proper and consistent regulation of utilities. *See Campbell, supra.*

It is clear that, by denying the Motion to Dismiss submitted by Petitioners, the trial court not only exceeded its authority and acted in an arbitrary and capricious manner, but the Superior Court seeks to proceed without, or in excess of, its jurisdiction or legal authority. This is an extraordinary situation where Petitioner does not have an equally plain, speedy or adequate remedy by appeal, because the issue at hand should not be addressed in the Superior Court in the first instance.

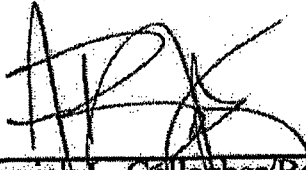
CONCLUSION

Petitioners request that this Court accept jurisdiction over this special action petition, because the trial court has exceeded its authority and jurisdiction by violating the exclusive jurisdiction that the Arizona Constitution, statutes and case law give to the Arizona Corporation Commission. Therefore, Petitioners request that this Court order relief in the form of dismissal of the tariff-based claims contained in Respondents' counterclaim no. five with instruction that those claims should be addressed exclusively by the Arizona Corporation Commission in the pending formal complaint action before the ACC.

RESPECTFULLY SUBMITTED this 9th day of March, 2012.

SANDERS & PARKS, P.C.

By



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CERTIFICATE OF COMPLIANCE

Pursuant to RPSA 7(e), I certify that the attached brief:

X

Uses proportionately spaced type of 14 points or more, is double spaced using a roman font and for opening and answering briefs does not exceed 10,500 words or for reply briefs does not exceed 5,250 words or

Uses monospaced type of no more than 10.5 characters per inch and

Does not exceed 30 pages for opening and answering briefs or 15 pages for reply briefs.

DATED this 9th day of March, 2012.

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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

Johnson Utilities, LLC; The Club at
Oasis, LLC; George H. Johnson; Jana
S. Johnson; Brian F. Tompsett,

Petitioners,

vs.

Superior Court of Arizona, in and for
the County of Maricopa, and the
Honorable Dean Fink, a judge thereof,

Respondents,

and

Swing First Golf, LLC; David Ashton,

Respondents-Real Parties in
Interest.

1 CA-CV _____

Maricopa County Superior Court
No. CV2008-000141

REQUEST FOR EMERGENCY
INTERLOCUTORY STAY
PENDING SPECIAL ACTION
REVIEW

Pursuant to Rule 5, Rules of Procedure for Special Action, Petitioners hereby request entry of a stay in the above-entitled matter to allow them the opportunity to seek special action review of this Court's ruling denying their Motion to Dismiss for Lack of Subject Matter Jurisdiction in the trial court below. This case is currently set to begin trial on March 12, 2012 on several claims and counterclaims. As set forth in the Petition for Special Action filed contemporaneously with this Motion, by minute entry order dated March 7, 2012 the trial court below denied Petitioners' Motion to Dismiss, which was based on the fact that the superior court lacks of subject matter

jurisdiction over claims that are in the exclusive province of the Arizona Corporation Commission's jurisdiction, and which are currently actively pending before the Arizona Corporation Commission on a formal complaint filed by Respondents against Petitioner. By denying the motion, the trial court is attempting to exercise subject matter jurisdiction over matters that are exclusively reserved for determination by the Arizona Corporation Commission – ie, a tariff dispute between a customer and utility raised in Respondents' counterclaim count five (entitled "Breach of Contract – Tariff Rate Schedule"). Because the Arizona Corporation Commission has sole and exclusive jurisdiction relating to any tariff, Petitioners request an immediate stay of all proceedings below to provide an opportunity for special action review by this Court.

The questions of the jurisdiction of the Superior Courts over a matter, and regarding the scope of authority of the Arizona Corporation Commission, are appropriate issues for special action jurisdiction. *See e.g. Mountain States Tel. & Tel. Co. v. Arizona Corporation Commission*, 160 Ariz. 350, 351, 773 P.2d 455, 456 (1989); *see also Qwest Corp. v. Kelly*, 204 Ariz. 25, 27, 59 P.3d 789, 791 (App. 2002); *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 218 P.3d 1045 (App. 2009)(Court of Appeals will accept jurisdiction of a special action when trial court is threatening to proceed without subject matter jurisdiction in excess of its authority). To the extent that the trial court lacks subject matter jurisdiction over some of the claims to be presented for the currently-set trial, scheduled to begin on March 12, 2012, it would be prejudicial to require such claims to proceed without appellate review.

As discussed in more detail in the Petition for Special Action, the trial court below previously held that the issues in this matter relate to the "charge for, nature and quality" of the regulated water service provided by [Petitioner] Johnson" and that such issues should be determined by the Arizona Corporation Commission. *See*

Minute Entry Order dated May 28, 2008, attached to the Appendix to Petition for Special Action, 5 (ruling "the Court is of the opinion that it should refrain from becoming involved until the Corporation Commission has made its initial determination.") Notwithstanding the trial court's prior ruling, the underlying case proceeded into the discovery phase due to the presence of other claims. Petitioners moved for summary judgment in the underlying case on nearly all claims, including counterclaim count five ("Breach of Contract – Tariff Rate Schedule"). On February 10, 2012, the trial court denied Petitioners' motion for summary judgment on counterclaim count five. As a result, Petitioners moved to dismiss counterclaim count five for lack of subject matter jurisdiction on February 13, 2012. After an expedited briefing, on March 7, 2012, the trial court below denied Petitioners' motion to dismiss. The only way to remedy the error of this ruling is through a petition for special action, and given the impending trial date (one business day after the filing of this motion, and only 3 business days following the trial judge's ruling on the motion to dismiss), an immediate stay of the trial below is necessary to avoid prejudice and further error which cannot be resolved by an equally plain, speedy and adequate remedy on appeal – if the trial court lacks jurisdiction and a jury is nonetheless allowed to render a verdict on issues in the exclusive province of the ACC, Petitioner could end up with conflicting and inconsistent determinations from a jury and the ACC on the same issues.

Pursuant to ARCAP 7(c), an application for an order pursuant to this rule was first made to the respondent judge. Petitioners contacted presiding Judge Fink's chambers upon receipt of his order denying the motion to dismiss, in order to seek a stay of the trial pending a petition for special action. However, counsel was informed that Judge Fink was unavailable to hear a motion to stay as he was presiding over a different trial. Judge Fink's staff directed Petitioners to raise any issues related to their motion to stay with Judge Rea, the case transfer judge scheduled to preside over

the trial if Judge Fink is still unavailable on March 12. Petitioners filed a written motion to stay the trial on March 7, 2012 and were heard on the motion to stay by Judge Rea on March 8, 2012. Judge Rea denied Petitioners' motion to stay during a telephonic conference. No written order has been issued as yet. Trial is still slated to begin on March 12, 2012.


Petitioners are entitled to a stay of the trial because they have no "equally plain, speedy, and adequate remedy by appeal" A.R.S. § 12-120.21. Subject matter jurisdiction cannot be waived – and here, the Arizona Corporation Commission has sole and exclusive jurisdiction over counterclaim count five ("Breach of Contract – Tariff Rate Schedules). Petitioners should not be required to endure trial on issues over which the trial court lacks subject matter jurisdiction. Moreover, as noted above, there exists a high risk of inconsistent and directly conflicting results in this case where a parallel action is pending in front of the Arizona Corporation Commission raising nearly identical tariff rate issues by Respondents (in fact, after filing their formal complaint with the ACC, Respondents sought dismissal of the superior court action, claiming that the ACC had exclusive jurisdiction over the issues). It is a near certainty that a lay jury determination in the Superior Court will be different than the result rendered by the Arizona Corporation Commission, over issues properly addressed by the Arizona Corporation Commission due to its significant expertise, resources and, importantly, jurisdiction over tariff-based complaints.

The only proper forum for Respondents' counterclaim count five ("Breach of Contract – Tariff Rate Schedule") is the Arizona Corporation Commission. Accordingly, Petitioners seek an immediate stay of the trial court proceedings below, pending special action review.

RESPECTFULLY SUBMITTED this 9th day of March, 2012.

SANDERS & PARKS, P.C.

By



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